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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

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| JOHN DURRANT et al.,<br>Plaintiffs and Respondents,<br>v.<br>NICOLE CASTANEDA,<br>Defendant and Appellant. | A123704<br><br>(Marin County<br>Super. Ct. No. CV 073957) |

Appellant signed a promissory note reflecting a loan made by respondents to a business entity of which appellant was part owner. The promissory note was at least arguably ambiguous regarding whether appellant and her co-owner signed it only as representatives of the business entity, or in their own personal capacities as well. The loan was not repaid, and respondents sued the business entity, appellant, and the co-owner of the business entity in superior court. Unbeknownst to respondents, appellant had filed a personal bankruptcy proceeding that was still pending at the time the complaint was filed and served. None of the defendants answered the complaint. The clerk entered the defendants' defaults, as well as a default judgment, and respondents obtained a writ of execution. After appellant's bankruptcy was dismissed, respondents levied against bank accounts held in the name of the business entity.

After additional proceedings in the superior court and the bankruptcy court, appellant and the business entity filed a motion in superior court seeking several different forms of relief. The superior court vacated appellant's default and the default judgment, as well as the writ of execution as to her; declined to quash the service of summons on

appellant; corrected, but declined to vacate, the judgment against the business entity; and declined to order that the money levied from the bank accounts be turned over to appellant.

Appellant, but not the business entity, appealed from the trial court's order. We dismiss the appeal to the extent that it relates to portions of the trial court's order that are not appealable, at least by appellant. As to the one portion of the trial court's order that is appealable, we affirm.

## FACTS AND PROCEDURAL BACKGROUND

On February 10, 2005, respondents John and Maura Durrant (the Durrants) obtained a promissory note (the note) relating to a loan of $175,000 that the Durrants had made. The note included the following text: "Borrower: Logomarsino Castaneda Endeavers [*sic*], LLC to be referred to in this document as LCE. (Greg Logomarsino [*sic*] and Nicole Bregante-Castanded [*sic*])."[1] In the quoted provision, the typed text "Bregante-Castanded" was overwritten by hand to read "Bregante-Castandea" [*sic*]. The note was signed by Greg Lagomarsino and Nicole M. Castaneda, each time opposite the text "Borrower Signature," with no indication of the capacity in which the person was signing. The Durrants also signed the note. The authenticity and validity of the note are not disputed on this appeal, but the parties have differing positions as to whether Castaneda is liable for the entire debt, or only to the extent of her interest in LCE.

In January 2007, Castaneda filed a personal chapter 13 bankruptcy. She did not list the Durrants as creditors, or notify them of the bankruptcy. Castaneda contends that she was not obligated to do so, because she and Lagomarsino signed the note only in their "capacity as member[s] and co-manager[s] of the LLC" (i.e., LCE), and she is therefore not personally liable for the debt represented by the note.

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[1] In keeping with the parties' usage, we will refer to Lagomarsino Castaneda Endeavors, LLC as LCE. It is undisputed that LCE is a limited liability company (LLC) owned by Lagomarsino and Castaneda, and that LCE's purpose was to operate a business under the name Golden Gate Fitness. Maura Durrant is Castaneda's sister.

The note apparently was not paid as scheduled. On August 21, 2007, the Durrants filed a complaint in Marin County Superior Court (the superior court) alleging breach of contract, and a common count for money lent, against Lagomarsino, Castaneda (misnamed in some parts of the complaint as Costaneda), and LCE (collectively the defendants). The complaint alleged that all of the defendants, not just LCE alone, were legally obligated to repay the money, and in addition, that there was "a unity of interest and ownership by Lagomarsino, Castaneda, and LCE," such that LCE was "an alter ego of all other defendants." The Durrants sought repayment of the loan principal, in the amount of $175,000.00, plus interest at 12 percent per year, which the complaint alleged had already accrued in the amount of over $55,000.00.

On October 11, 2007, the Durrants filed proofs of service in the superior court action alleging that the complaint was served personally on Lagomarsino, both in his personal capacity and as the agent for service of process for LCE, and was also served on Castaneda by personal delivery to her co-worker, Lagomarsino, and by mail.[2] On November 21, 2007, the clerk of the superior court entered a default judgment against all the defendants. The judgment awarded the Durrants damages in the amount of $230,000.00; prejudgment interest in the amount of $81,291.50, and costs in the amount of $520.00. It also provided that a writ of execution would issue upon application.

On January 30, 2008,[3] the superior court issued a writ of execution (the writ) on the judgment, directed to the San Francisco County Sheriff (the Sheriff), listing Castaneda, Lagomarsino, and LCE as the judgment debtors. On February 5, the writ was levied against bank accounts that belonged to one or more of the defendants. The Sheriff obtained $81.72 from Castaneda's personal bank account, and $3,750.12 from a bank account held in the name of LCE.

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[2] Castaneda did not maintain in the trial court, and does not argue here, that she did not receive the summons or was unaware of the pendency of the Durrants' action against her.

[3] All further references to dates are to the year 2008 unless otherwise specified.

Sometime in late February (according to the Durrants' counsel), or possibly as early as late January (according to Castaneda), the Durrants learned that Castaneda had filed a personal chapter 13 bankruptcy that was still pending in bankruptcy court. Accordingly, they cancelled debtor examinations that they had planned to conduct. On April 10, however, Castaneda's bankruptcy case was dismissed. In the meantime, on March 7, the San Francisco County Recorder recorded an abstract of judgment and judgment lien against real property owned by Castaneda, which the Durrants' attorney had mailed to the recorder's office on February 4.[4]

On July 2 and again on July 17, the Sheriff mailed notices of levy to Castaneda, relating to amounts of $3,750.12 and $2,321.04 collected by the Sheriff from a bank account held in the name of LCE.[5] According to Castaneda, this account "was used by [LCE] to manage income (i.e. pay bills and distribute income)" from the business operated by LCE, and contained funds that Castaneda avers belonged to her "by law and agreement between [Castaneda] and . . . Lagomarsino" and were "allocated to [Castaneda] 100% as [her] income." On July 23, the superior court granted Castaneda's ex parte application for an order staying any further levy on the writ, and directing the Sheriff not to collect or disburse any funds relating to the writ pending further order of the court. The court also barred the Durrants from pursuing any further collection activities pending a hearing on Castaneda's motion to vacate her default and the default judgment entered against her.

On August 28, the Durrants filed a motion in the bankruptcy court seeking retroactive relief from the automatic bankruptcy stay in Castaneda's bankruptcy case. As a result, on September 10, the superior court case was stayed as against Castaneda.[6]

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[4] This lien was apparently released, at the request of Castaneda's counsel, several months later.

[5] This appears to have been the same bank account that had been levied against on February 5.

[6] Meanwhile, Lagomarsino apparently filed for bankruptcy on September 3, 2008, and the Durrants' action was therefore stayed as against him at that point. He is not a party to this appeal.

There is nothing in our record indicating that Castaneda filed any motion in the bankruptcy court in response to that filed by the Durrants. On September 15, the bankruptcy court held a hearing on the Durrants' motion. On October 21, that court filed an order denying the Durrants' motion, and declaring that the judgment entered in the superior court was void as to Castaneda, "without prejudice to any renewed action" by the Durrants. The bankruptcy court's order did not address the validity of the service of process on Castaneda, or of the entry of her default. During the hearing, however, the bankruptcy judge "strongly suggest[ed]" that there was "no basis for any claim for wrongful violation of the stay," and stated that there was "no basis to bar the action" against Castaneda.

On October 22, Castaneda and LCE jointly filed the motion that gave rise to the order from which this appeal was taken. The motion sought several forms of relief: (1) an order vacating Castaneda's default and the default judgment entered against her; (2) an order quashing the issuance of the summons against Castaneda; (3) an order vacating the default judgment entered against LCE; and (4) an order directing the Sheriff to return the funds in the Sheriff's possession that, according to Castaneda, belonged to her and Lagomarsino personally and "were obtained by way of wrongful levy." While the motion was pending, on November 18, the Durrants stipulated that the default and default judgment should be set aside as against Castaneda only.

On December 8, the trial court entered the order from which this appeal was taken (the December 8 order). Like Castaneda and LCE's motion, the December 8 order addressed several different issues. First, recognizing that Castaneda's default and the default judgment as to her had been set aside, the court granted Castaneda 30 days to answer the complaint. For the same reason, the court set aside the writ of execution as to Castaneda. Second, with respect to Castaneda's motion to quash the service of the summons and complaint, the court characterized it as one brought under Code of Civil

Procedure section 418.10, subdivision (a),[7] and as such, denied it as untimely. Third, with respect to the motion to vacate the default judgment against LCE, the court granted it in part by correcting errors in the amount of the judgment, but declined to vacate the judgment in its entirety. Finally, the court declined to order that the funds levied from LCE's bank account[8] be turned over to Castaneda, on the grounds that the default judgment against LCE was valid, and the levy against a bank account held in LCE's name was therefore proper.

On December 22, Castaneda filed a notice of appeal, in her own name only, from the December 8 order. Castaneda's notice of appeal characterizes her appeal as one from an order after judgment under section 904.1, subdivision (a)(2).

**DISCUSSION**

The Durrants argue that the December 8 order was not appealable, and urge this court to dismiss Castaneda's appeal in its entirety. Our analysis of the December 8 order is that it embodies the trial court's ruling on four different sets of issues, each of which is severable from the others. (See *Calhoun v. Vallejo City Unified School Dist.* (1993) 20 Cal.App.4th 39, 41-42 [where single trial court order both denied motion for change of venue and imposed sanctions on moving party's attorney, two rulings were not interdependent, so Court of Appeal considered appealability of each portion of order separately]; *ReadyLink Healthcare v. Cotton* (2005) 126 Cal.App.4th 1006, 1014-1015 [appeal from one provision of preliminary injunction was permissible where other provisions of injunction were severable]; see generally *Gonzales v. R. J. Novick Constr. Co.* (1978) 20 Cal.3d 798.) Accordingly, we will consider the appealability of each portion of the order separately.

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[7] All further statutory references are to the Code of Civil Procedure unless otherwise noted.

[8] The order refers to "bank accounts" (plural), but the record does not appear to reflect the existence of more than one LCE bank account that was levied upon.

### A. Order Setting Aside Castaneda's Default and Vacating Default Judgment and Writ as to Castaneda

An order setting aside a default is not an appealable order, even if entered after judgment, because it contemplates further proceedings in the case and therefore is not final. (See *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 652 (*Lakin*); *Concerned Citizens Coalition of Stockton v. City of Stockton* (2005) 128 Cal.App.4th 70, 79-81; *Barnes v. Litton Systems, Inc.* (1994) 28 Cal.App.4th 681, 684-685; *Veliscescu v. Pauna* (1991) 231 Cal.App.3d 1521.) This is exemplified here by the fact that the December 8 order granted Castaneda 30 days to answer the complaint, and thus obviously contemplated further proceedings on the merits of the controversy between her and the Durrants.

An order vacating a default judgment or a writ of execution may be appealable, but not by the party who *sought* that relief, because that party is not "aggrieved" by the order. (§ 902; *In re D.S.* (2007) 156 Cal.App.4th 671, 673-674; see generally 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 41, pp. 102-103.) Here, Castaneda *benefited* from the December 8 order insofar as it set aside her default, the default judgment against her, and the writ of execution with respect to her. That was part of the relief sought by her motion, and the December 8 order granted it. Thus, she is not a party aggrieved by those provisions of the December 8 order, and cannot appeal them.

Castaneda does not argue on appeal that the portions of the December 8 order setting aside her default and vacating the default judgment and writ as against her should be reversed. In any event, to the extent that she intended to appeal these portions of the order, the appeal must be dismissed.

### B. Order Denying Castaneda's Motion to Quash Service of Summons and Complaint

The superior court treated Castaneda's motion to quash the service of summons on her as a statutory motion under section 418.10, and denied it as untimely under that statute. On appeal, Castaneda argues that her motion was a non-statutory motion to

quash, made on the ground that the service of summons was void due to the bankruptcy stay, and therefore was not subject to the time limit in section 418.10, subdivision (a).

An order denying a motion to quash is reviewable only by writ, not by an immediate appeal from the order. (*In re Marriage of Hattis* (1987) 196 Cal.App.3d 1162, 1165, fn. 2; *Milstein v. Ogden* (1948) 84 Cal.App.2d 229, 235; *Saroff v. Saroff* (1944) 66 Cal.App.2d 330, 331; 9 Witkin, Cal. Procedure, *supra*, Appeal, § 171(3), p. 247.) Here, Castaneda argues that the order denying her motion to quash is appealable because it was issued after a judgment had been entered in the case. However, that judgment was set aside as to Castaneda, and the order denying Castaneda's motion to quash contemplates further proceedings in the case. Therefore, based on the authority and reasoning discussed *ante* with regard to the portion of the December 8 order that vacated Castaneda's default, the order denying her motion to quash is also not final.

*Solis v. Vallar* (1999) 76 Cal.App.4th 710, 712, on which Castaneda relies, is not to the contrary. That case involved an order regarding a partition sale, entered after a judgment of partition which, by specific statute, is an appealable judgment. Moreover, in that case, unlike in this one, the judgment was not set aside before the entry of the order from which the appellant appealed. Thus, the holding in that case is entirely inapposite. Castaneda also relies on *Lakin*, *supra*, 6 Cal.4th 644. As that case expressly recognized, however, in order for a postjudgment order to be appealable, the underlying judgment must be final. (*Id.* at p. 651, fn. 3.) In the present case, not only is the underlying judgment not final as to Castaneda, it did not even exist at the time the December 8 order was filed, having been vacated by stipulation of the parties (implementing the bankruptcy court's ruling) on November 18.

In short, the portion of the December 8 order denying Castaneda's motion to quash is not made appealable by the fact that a judgment was entered before the December 8 order was filed. This aspect of the appeal must therefore be dismissed.

**C. Order Denying Motion to Vacate Default Judgment as to LCE**

As already noted, although the motion underlying the December 8 order was filed both by Castaneda and by LCE, the appeal was filed only by Castaneda. The Durrants

therefore contend that LCE is not a party to this appeal, and has not challenged the trial court's order.

In response, Castaneda argues that she has standing to bring this appeal "in a derivative capacity" as a member of the LLC. This argument was not made in the trial court, where the motion was brought in LCE's own name as well as in Castaneda's. It is raised for the first time in Castaneda's reply brief on appeal. We therefore decline to consider it. (*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 110-111 [appellant could not assert new grounds for motion for first time on appeal]; *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 763-766 [Court of Appeal will not consider arguments raised for first time in appellant's reply brief].)

The provision in the December 8 order denying LCE's motion to vacate the default judgment against it has not been appealed by a party with standing to do so. The appeal from this portion of the December 8 order must therefore be dismissed.

**D. Order Denying Castaneda's Motion for Return of Levied Funds**

The portion of the December 8 order denying Castaneda's motion for the return of the levied funds is appealable as an order entered after judgment, and relating to the enforcement of the judgment. (*Jones v. World Life Research Institute* (1976) 60 Cal.App.3d 836, 839; see generally 9 Witkin, Cal. Procedure, *supra*, Appeal, § 185, pp. 261-262.) Its appealability is not affected by the fact that the judgment was vacated as against Castaneda, because the judgment against LCE still stands, and the writ giving rise to the levy was based on that judgment as well as the judgment against Castaneda. Moreover, Castaneda has standing to appeal this portion of the order, because she contends the funds levied actually belong to her, and thus was aggrieved by the trial court's denial of her motion to have the funds returned to her. Accordingly, as to this portion of the December 8 order only, we decline respondents' request that we dismiss Castaneda's appeal, and will proceed to consider the merits.

In moving for the return of the levied funds, Castaneda argued in the trial court, and reiterates on appeal, that although the funds were in a bank account held in the name of LCE, they actually belonged to her. On appeal, she attacks the sufficiency of the

evidence as to the actual ownership of the funds. She acknowledges that the funds were held in a bank account under the name of LCE, but argues–citing no authority–that "[t]he name of the account reveals nothing about the identity of the owner of the funds in the account . . . ."

This simply is not the law. The holder of legal title to property is statutorily presumed to be the holder of full beneficial title as well, in the absence of clear and convincing evidence to the contrary, or a challenge to the validity of the legal title itself. (Evid. Code, § 662; see generally *People v. Semaan* (2007) 42 Cal.4th 79, 88-89.) For this purpose, the name in which a bank account is held indicates the identity of the owner of the legal title to the funds in the account. (See *Spear v. Farwell* (1935) 5 Cal.App.2d 111, 114 [where funds in bank account were wife's property, but account was set up, by mistake, in name of both husband and wife as joint tenants, husband had only naked legal title to funds in account, and funds could not be levied by husband's creditor].) Thus, by statute, the trial court was entitled to presume that the funds in the bank account belonged to LCE, unless Castaneda produced clear and convincing evidence that they were, in fact, her personal funds. In reviewing the trial court's implied finding that Castaneda did not produce sufficient evidence to satisfy that standard, our task is to determine whether that finding is supported by substantial evidence in the record. (See *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 891.)

The only direct evidence that Castaneda produced to support her contention that the funds were actually hers was her own declaration to that effect. The declaration refers to an agreement between Castaneda and Lagomarsino allocating the funds to her, but Castaneda did not proffer either a document or a declaration from Lagomarsino to substantiate the existence and terms of such an agreement.

In addition, Castaneda's trial counsel submitted a declaration stating that he had been informed by an employee of the Sheriff that in levying the funds in the bank account, the Sheriff's intent or belief was that the levy was reaching funds belonging to Castaneda. At the hearing, counsel explained that he had not been able to procure records from the Sheriff's office supporting this contention. Even if such records had

been available, however, the trial court would still have been entitled to rule as it did. The identity of the owner of the funds in the bank account was a legal question for the court, and to the extent that the Sheriff's records reflected the Sheriff's opinion on that issue, the opinion was not admissible evidence. (See *Summers v. A. L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1178-1181 [expert testimony that states legal conclusions infringes on the trial judge's functions and is inadmissible]; *Downer v. Bramet* (1984) 152 Cal.App.3d 837, 841 [same].)

In short, substantial evidence supports the trial court's finding that Castaneda failed to produce clear and convincing evidence of her beneficial ownership of the funds in LCE's bank account. The trial court therefore did not err in declining to order those funds returned to Castaneda.

### E. Motion for Judicial Notice

On April 1, 2009, Castaneda filed a motion in this court requesting that we take judicial notice of two documents, which Castaneda acknowledges were not presented to the trial court. They are a case summary obtained from the bankruptcy court's website, and a printout from the Secretary of State's website confirming the formation and continued existence of LCE. On April 7, 2009, we issued an order stating that the motion would be considered together with the merits of the appeal. Given our disposition of the appeal, the documents in question are not relevant to the issues we have decided. Moreover, Castaneda's motion does not explain why the documents were not presented to the trial court. Accordingly, the motion to take judicial notice is denied.

## DISPOSITION

With respect to all provisions in the trial court's December 8 order except the portion denying Castaneda's motion for the return of the levied funds, the appeal is DISMISSED. With respect to Castaneda's motion for the return of the levied funds, the December 8 order is AFFIRMED. Castaneda's motion to take judicial notice is DENIED. The Durrants shall recover their costs on appeal.

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Ruvolo, P.J.

We concur:

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Reardon, J.

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Sepulveda, J.